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Number of pages: 5

Title: Foreign Corporations (Application of Laws) Act 1989 - (An Act relating to the law to be applied in determining certain questions relating to foreign corporations, and for related purposes)

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**Foreign Corporations (Application of Laws)
Act 1989**

No. 183 of 1989



Foreign Corporations (Application of Laws) Act 1989

No. 153 of 1989

An Act relating to the law to be applied in determining certain questions relating to foreign corporations, and for related purposes

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

Short title

1. This Act may be cited as the *Foreign Corporations (Application of Laws) Act 1989*.

Commencement

2. This Act commences on the day on which it receives the Royal Assent.

Interpretation

3. In this Act, unless the contrary intention appears:

“asset” means property of any kind, and includes:

- (a) any legal or equitable estate or interest (whether present or future, vested or contingent, tangible or intangible) in real or personal property of any description; and

- (b) any chose in action; and
 (c) any right, interest or claim of any kind in or in relation to property (whether arising under an instrument or otherwise, and whether liquidated or unliquidated, certain or contingent, accrued or accruing);
- 5
 "Australia" includes all the external Territories;
 "Australian court" means a federal court or a court of a State or Territory;
 "Australian law" means:
- 10
 (a) a law in force throughout Australia; or
 (b) a law of, or in force in, a part of Australia;
 and includes the principles and rules of the common law and equity as so in force;
- 15
 "body" includes an association, entity or society;
 "entity" includes an executive entity and, in sections 8 and 9, also includes a legislative or judicial entity;
 "foreign corporation" means a body or person incorporated in a place outside Australia;
 "incorporate" includes form;
- 20
 "law" includes written and unwritten law;
 "officer", in relation to a foreign corporation, includes a director, secretary, executive officer, agent or employee of the foreign corporation;
 "place" means a place that, in practice, applies a separate system of law.

Extraterritorial operation of Act

4. This Act applies both within and outside Australia.

Extension of Act to external Territories

5. This Act extends to each of the external Territories.

Act to bind Crown

6. This Act binds the Crown in right of the Commonwealth, each of the States, the Australian Capital Territory, the Northern Territory and Norfolk Island.

Law applied in place of incorporation applicable law in determining questions relating to status of foreign corporation etc.

7. (1) The section applies in relation to the determination of a question arising under Australian law (including a question arising in a proceeding in an Australian court) where it is necessary to determine the question by reference to a system of law other than Australian law.
- (2) Any question relating to whether a body or person has been validly incorporated in a place outside Australia is to be determined by reference to the law applied by the people in that place.

- (3) Any question relating to:
- (a) the status of a foreign corporation (including its identity as a legal entity and its legal capacity and powers); or
 (b) the membership of a foreign corporation; or
 (c) the shareholders of a foreign corporation having a share capital; or
 (d) the officers of a foreign corporation; or
 (e) the rights and liabilities of the members or officers of a foreign corporation, or the shareholders of a foreign corporation having a share capital, in relation to the corporation; or
 (f) the existence, nature or extent of any other interest in a foreign corporation; or
 (g) the internal management and proceedings of a foreign corporation; or
 (h) the validity of a foreign corporation's dealings otherwise than with outsiders;
- 5
 is to be determined by reference to the law applied by the people in the place in which the foreign corporation was incorporated.
- 10
 (4) A matter mentioned in subsection (2) or (3) is not to be taken, by implication, to limit any other matter mentioned in those subsections.
- 15

Certain acts not to be recognised etc.

8. Where an act of a foreign state, or an entity of a foreign state:
- (a) purports to affect a foreign corporation or its assets or dealings; and
 (b) the act is based on, or derives from, the assertion of sovereignty or other authority over the place in which the foreign corporation was incorporated;
- 20
 the act is not to be recognised, or in any way given effect to, under Australian law unless it is recognised, and would be given effect to, under the law applied by the people in the place in which the foreign corporation was incorporated.
- 25

Recognition or non-recognition irrelevant consideration in application of Act etc.

9. (1) It is the intention of the Parliament that the application of this Act is not to be affected by the recognition or non-recognition, at any time, by Australia:
- (a) of a foreign state or place; or
 (b) of the government of a foreign state or place; or
 (c) that a place forms part of a foreign state; or
 (d) of the entities created, organised or operating under the law applied by the people in a foreign state or place.
- 30
 35

(2) Without limiting subsection (1), it is also the intention of the Parliament that the application of this Act is not to be affected by the presence or absence, at any time, of diplomatic relations between Australia and any foreign state or place.

I HEREBY CERTIFY that the above is a fair print of the Foreign Corporations (Application of Laws) Bill 1989 which originated in the Senate and has been finally passed by the Senate and the House of Representatives.


Clerk of the Senate

IN THE NAME OF HER MAJESTY, I assent to this Act.


Governor-General
29 DEC 1989

NAA: A432, BAD1989/14272

Series number: A432

Control symbol: BAD1989/14272

Barcode: 24259472

Number of pages: 206

Title: Foreign Corporations (Application of Laws) Act 1990 - Companies and Securities aspects

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Page 1

RELATED FILES	
File No.	Title

INSTRUCTIONS FOR USE OF FILE

*Before directing any further movement of file:
Clear the reference to yourself by writing
initials and date in column 3.*

TO DIRECT MOVEMENT OF FILE:

(a) *To Another Officer: Write the appropriate
folio number in column 1, and the name
of the officer to whom the file is to be
referred in column 2.*

*If the file to be referred to more than one
officer, list the names in column 2,
prefixing them with (1), (2), etc.*

(b) *For Resubmit: Write the appropriate folio
number in column 1, and the symbol
'R/S'; the name of the officer to whom
the file is to be resubmitted and the date
it is required in column 2.*

Column 3 will be completed by Registry.

(c) *For Put-Away: Write Symbol 'P/A', initials
and date in column 2.*

Column 3 will be completed by Registry.



NATIONAL ARCHIVES OF AUSTRALIA

STATEMENT OF REASONS FOR DECISION UNDER SECTION 40(5)
OF THE *ARCHIVES ACT 1983*

Series	A432
Control Symbol	BAD1989/14272
Item ID	24259472
Title	Foreign Corporations (Application of Laws) Act 1990 - Companies and Securities aspects
Decision Maker	ECooper
Designation	APS 6
Date	13 AUGUST 2024

In accordance with requirements of subsection 8(1) of the *Archives Act 1983* (Cth) (Archives Act), I am a person authorised by the Director-General, pursuant to an Instrument of Delegation, to make a decision in relation to access to the requested item.

Basis for decision

In making my decision, I considered:

- the content of the item requested
- *the relevant provisions of the Archives Act 1983*
- policy and guidelines of National Archives of Australia that relate to the access examination of Commonwealth records
- information provided by Commonwealth agencies which I have relied upon in formulating my decision

Decision

After examining this item I have decided that this item is open with exception under 33(1)(a), (d) and 33(2)(a)(b) of the Archives Act for the reasons set out below.

184 folios [fo. 46 - 51, 87 - 92, 107 - 133, 148, 156 - 189, 196 - 228, 232 - 264, 313 - 315, 339 - 348 & 356 - 359] have been fully exempt from public access.

The findings of facts

Section 33(1)(a) of the *Archives Act 1983* provides that:

a record is exempt from public access if it contains information or matter the disclosure of which under this Act could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth.

National Reference Service | PO Box 4924, Kingston ACT 2604
e ref@naa.gov.au naa.gov.au

This item contains:

- Details which if disclosed could affect the Commonwealth's relations with the current government of a foreign country.
- Information that reveals the areas of interest of Australian intelligence agencies.
- Information relevant to the capability, sources, objectives, methods, areas of interest or operations of an Australian intelligence agency. The information is still regarded as sensitive.

Section 33(1)(d) of the *Archives Act 1983* provides that:

a record is exempt from public access if it contains information or matter the disclosure of which under this Act would constitute a breach of confidence.

This item contains information provided in confidence.

Section 33(2) of the *Archives Act 1983* provides that a Commonwealth record is an exempt record if it is of such a nature that:

- (a) it would be privileged from production in legal proceedings on the ground of legal professional privilege; and
- (b) disclosure of the record would be contrary to the public interest.

This item contains:

- Information provided by a *legal practitioner* relating to matters which could still be considered confidential.
- Information which could subject a third party to legal proceedings.
- Information which may have contemporary relevance, and which could prejudice the legal position of the Commonwealth in the event of future legal proceedings.

Reasons for decision

Section 33(1)(a)

International relations are dependent upon the adequate flow of information between one country and another. If sensitive information was disclosed, it could lessen the confidence of a foreign government in the Australian Government and thus damage international relations.

The public disclosure of this information could compromise the future activities of Australian intelligence agencies and impair their ability to carry out their statutory functions. It would therefore reasonably be expected to cause damage to the defence and security of the Commonwealth.

Section 33(1)(d)

The information was provided with the expectation that it would remain confidential

The public disclosure of this information would constitute a breach of confidence.

There is no evidence that this information was ever published or that the subject of the file ever expected publication.

Section 33(2)(a)(b)

There was a client-solicitor relationship in existence at the time the item was created. The advice was provided by a qualified legal practitioner and was not for administrative purposes

If legal proceedings were undertaken the legal advice that was provided to the client would be privileged from being tendered in evidence on the grounds of legal professional privilege.

There is no evidence that the legal professional privilege has been waived or withdrawn by the client in the intervening period. Nor has the advice been made public.

The information continues to be sensitive despite the passage of time and the information has enduring confidentiality.

The public's interest to know about the decisions of government is outweighed by the need for the information to be protected from release because of ongoing sensitivities. Therefore, it would be contrary to the public interest for information to be disclosed.

Review of decision

The National Archives of Australia (the Archives) carefully examines items before deciding to exempt any part of them. As part of that process we may consult with other agencies which have expertise on specific national and international matters.

If you do not agree with the decision, you can formally appeal within 28 days of receiving a decision:

1. by first applying to the Archives for an internal reconsideration of my decision; and
2. if you still do not agree with the decision, you can apply to the Administrative Appeals Tribunal for a review.

For more information please see [What to do if we refuse you access](https://www.naa.gov.au/help-your-research/using-collection/access-records-under-archives-act/what-do-if-we-refuse-you-access) (<https://www.naa.gov.au/help-your-research/using-collection/access-records-under-archives-act/what-do-if-we-refuse-you-access>).

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ATTORNEY-
GENERAL'S

FILE TRANSFER ADVICE

AG117(8/89)

TO BE KEPT ON TOP OF FILE

It is imperative for a transfer advice slip to be completed and forwarded to Registry when a file is passed by hand to another person. This advice is used to update Registry records and so enable immediate location of the file.

ATTORNEY-
GENERAL'S

FILE TRANSFER ADVICE

AG117(8/89)

File No has been passed to

.....

..... / / 19

Initials

Time

Date

Commonwealth of Australia
ATTORNEY-GENERAL'S DEPARTMENT
CANBERRA

BAD89/14272

Foreign Corporations (Application of Laws) Act 1989

in ya - Thanks
Mr O'Callaghan
Noted,
Thanks
@ 25.1.1990

Mr C Creswell
Acting First Assistant Secretary
Business Affairs Division

I refer to your note to Mr O'Callaghan of 17 January 1990 concerning the Bill for the Foreign Corporations (Application of Laws) Act 1989 ('the Act').

2. The Department of Industry, Technology and Commerce is responsible for the Act. Its primary purpose is to encourage certain foreign investment by clarifying the status of bodies incorporated in unrecognised entities in Australia. Our Department's input was largely provided by Mr H Burmester, Special Adviser (International Law). During the drafting of the Bill, comments were also made by interested parties in Justice, Criminal Law and this Division.

3. I would add that the Bill was introduced and passed by both Houses of Parliament on 21 December 1989. It received Royal Assent on 29 December 1989.

Stephen Yen

(STEPHEN YEN)
for Senior Assistant Secretary
Companies and Securities Branch
Business Affairs Division

25 January 1990

29 JAN 1990
National Archives of Australia

NAA: A432, BAD1989/14272

TRADE

Taiwan's China Steel is getting local advice on the siting of a proposed \$4 billion steel mill in Australia.

Forging closer ties with Taiwan

By John McIlwraith

A more flexible Federal Government policy towards Taiwan is expected to lead to the introduction of flights from there to Australia by **Qantas** by the end of this year, and, in the longer term, a major joint venture to establish a steelworks.

Sources in Canberra working on these prospects claim that a major review — admittedly only the latest over many years — is examining Australia's ambivalent relationship with Taiwan.

They claim that most Cabinet ministers would like to see some form of recognition, allowing for the massive increase in trade and tourism that appears possible (a figure of \$500 million a year has been estimated).

China's increasing tolerance of ties with Taiwan is regarded as a major factor in encouraging this quasi-recognition, given that Prime Minister Bob Hawke's strong links with Beijing would preclude any shift in policy that did not receive at least tacit Chinese approval.

However, the current upheaval in China is seen in Canberra as a possible deterrent to any immediate change in our attitude towards Taiwan. In the medium term, if reforms do occur, the thaw between Beijing and Taipei could be accelerated. A strengthening of the Austrade presence in Taipei is already planned.

The latest catalyst for closer ties with Taiwan is a proposal to build a \$4 billion mill in Australia to export semi-processed steel to Taiwan, which faces a considerable shortfall in domestic production in the next few years. The **China Steel Corp**, which is almost completely owned by the Taiwanese Government but is in a process of partial privatisation, would ultimately own less than half the project here, with Australian investors being offered at least 40 per

cent. The balance would be in the hands of other Taiwanese interests.

The new Australian steel plant, the first not owned by **BHP**, would lift Australian production by 40 per cent. Almost all of it would be exported to Taiwan, earning \$1.5 billion a year in foreign exchange.

The siting of the new steel mill is to be investigated by the Australian consultants to China Steel, the Perth mer-



Hawkins Court chairman Ken Court Family has maintained trade link.

chant bank **Hawkins Court**. The bank's chairman, Ken Court, says it would require a construction workforce of 10,000, and a permanent staff of 6000, with a plant using the latest steel-making technology. A Canberra official pointed out the role that the Court family has played in maintaining trade links during the long period in which there have been no official ties.

Ken and his father Sir Charles Court, the former West Australian Premier, are

also acknowledged by sources in the WA Labor Government as being the most influential figures in Australian-Taiwanese relations.

Ken Court says the detailed information on the project would be assembled in the next six months and a decision could be expected by the end of next year. If the decision is favourable, it would still be five years from now before the venture was commissioned.

Although the impetus has come from West Australian interests (and China Steel is discussing other iron ore processing proposals with the West Australian Government), the steel mill is unlikely to be built in the Pilbara region.

High capital costs, distance from sources of coking coal, and lack of infrastructure in that region would offset the proximity to vast deposits of iron ore.

Sites in South Australia, Queensland and New South Wales would be considered. A port capable of handling vessels of 250,000 tonnes would be essential.

The WA Government, which maintains its own low-key office in Taipei, is optimistic about attracting some type of iron ore processing operation to the Pilbara, using perhaps direction reduction or electric furnace technology.

It is also negotiating with **CRA Ltd** to launch a venture using the company's new His-melt process to treat Pilbara iron ore. There remain two major obstacles to the Taiwanese proposal — the need to legitimise the relationship with Australia, and competition from Canada, which has the added attraction of the free-trade agreement with the US, thus giving the Taiwanese access. Other countries considered by the Taiwanese include Brazil and South Africa.

However, Ken Court suggests that Taiwan's appetite for steel is likely to grow to the extent that it could require at least two joint-venture projects.

For example, it will increase imports of steel this year from 2.5 million to 3 million tonnes, and the figure is expected to continue to rise, despite the fact that China Steel recently increased its capacity to 5.65 million tonnes annually.

Environmental problems (mainly associated with a shortage of land on the island) will inhibit further growth of the domestic industry.

Court has been negotiating for the past seven years, and the agreement to carry out a feasibility study was completed only three weeks ago.

Hawkins Court, a second board company on the Perth exchange, has no plans at this stage to acquire an equity interest in the steel venture. ■

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Commonwealth of Australia
ATTORNEY-GENERAL'S DEPARTMENT
CANBERRA

BAD89/14272

Foreign Corporations (Application of Laws) Act 1989

Mr C Creswell
Acting First Assistant Secretary
Business Affairs Division

I refer to your note to Mr O'Callaghan of 17 January 1990 concerning the Bill for the Foreign Corporations (Application of Laws) Act 1989 ('the Act').

2. The Department of Industry, Technology and Commerce is responsible for the Act. Its primary purpose is to encourage certain foreign investment by clarifying the status of bodies incorporated in unrecognised entities in Australia. Our Department's input was largely provided by Mr H Burmester, Special Adviser (International Law). During the drafting of the Bill, comments were also made by interested parties in Justice, Criminal Law and this Division.

3. I would add that the Bill was introduced and passed by both Houses of Parliament on 21 December 1989. It received Royal Assent on 29 December 1989.

sy

(STEPHEN YEN)
for Senior Assistant Secretary
Companies and Securities Branch
Business Affairs Division

25 January 1990

13. Overall, in my view, the introduction of the proposed legislation would not involve a breach of clause 47 of the Formal Agreement. Nor does the proposed legislation otherwise create any major difficulties vis-a-vis the co-operative scheme legislation. Generally speaking, the provisions dealing with foreign companies in this legislation presuppose the existence of a company that will be recognised by the courts. The proposed legislation simply complements these provisions by ensuring such recognition where the principles of private international law may deny it on the basis of the status of entity enacting the incorporating law.

Corporations Act 1989

14. The position in regard to the Corporations Act 1989 appears to be similar. Part 2.2, Division 3 and Part 4.1, Divisions 2 and 3 of that Act correspond to the transfer of incorporation and registration of foreign companies provisions previously discussed, respectively, with some modifications reflecting the national character of the legislation. In regard to the winding up provisions, s.350 and ss.583 and 585 of the Corporations Act correspond to ss.518 and 470 of the Companies Act and Codes respectively. Apart from the possible desirability of clarifying the drafting instructions in regard to the external administration of foreign corporations, there does not appear to be any difficulty with the Corporations Act operating alongside the proposed legislation, for the reasons already discussed. Similar advantages will result.

(Stephen Yen)
Companies and Securities Branch
Business Affairs Division

23 October 1989

Conflict of Laws

in Australia

Fourth Edition

P E NYGH
LLM (Syd) SJD (Mich)
A Judge of the Family Court of Australia

BUTTERWORTHS

SYDNEY — MELBOURNE — BRISBANE — ADELAIDE — PERTH — CANBERRA — HOBART
1984

CHAPTER TWENTY-SEVEN

Corporations

In Australia since 1 July 1982 the law relating to companies has been substantially governed by a common scheme agreed upon between the states and the Commonwealth. This scheme is embodied in the Companies Act 1981 (Cth) enacted as part of the law of the Australian Capital Territory and made applicable in each of the states by local legislation to be known as the Companies Code for that state. It establishes a central body known as the National Companies and Securities Commission to administer the legislation on a national basis. The Northern Territory is not as yet a party to the agreement. Reference hereafter will be made exclusively to the Companies Act 1981 (Cth) as the pilot legislation. In New Zealand the relevant Act is the Companies Act 1955 (NZ).

RECOGNITION

English courts have since 1728 recognised that a foreign corporation has standing to sue in England even though it has not been incorporated under English law: *Henriques v Dutch West Indies Co* (1728) 2 Ld Raym 1532. Strangely enough it was not established until 1872 that a foreign corporation could be sued in England: *Newby v Van Oppen* (1872) LR 7 QBD 293.

The law of the place of incorporation determines whether the corporation exists. As Lord Wright said in *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289 at 297:

But as the creation depends on the act of the foreign state which created them, the annulment of the act of creation by the same power will involve the dissolution and non-existence of the corporation in the eyes of English law. The will of the sovereign authority which created it can also destroy it. English law will equally recognise the one, as the other, fact.

Even if the foreign body is not a corporation under the law of the place of its origin, it may be recognised in the forum as having a separate personality from those of its members. In *Chaff and Hay Acquisition Committee v J A Hemphill & Sons Pty Ltd* (1947) 74 CLR 375, at 385, it was said by Latham CJ:

A body which, as distinct from the natural persons composing it, can have rights and be subject to duties and can own property must be regarded as having a legal personality, whether it is or is not called a corporation.

Consequently, it was held that the Chaff and Hay Acquisition Committee, a marketing body set up under the law of South Australia, was entitled to sue as such in New South Wales because under the law of South Australia the Committee could sue and be sued in its collective name and could acquire and

CORPORATIONS

hold property as the property of the Committee and not of its individual members.

A foreign unincorporated body such as a partnership which under the law of its origin can sue and be sued in its collective name, but does not otherwise possess a separate personality will, apart from statute, not have the standing to sue or be sued in its collective name in the forum: *Von Hellfeld v Rechnitzer* [1914] 1 Ch 748.

However, under the Australian Companies Act a foreign unincorporated association which under the law of the place of origin may sue or be sued or hold property in the name of the secretary or other officer of the association is included in the definition of "foreign company" under the Act: s 5 (1).

According to the law of certain foreign countries, partners are not liable to be sued individually until the plaintiff has exhausted his remedies against the partnership as such: Wolff at 239, 240. The parties are indeed individually liable, but the individual liability is postponed to their collective liability. English courts have regarded this limitation as being merely of a procedural nature and have, consequently, ignored it when action was brought against a partner individually in England: *Re Doetsch* [1896] 2 Ch 836.

PLACE OF INCORPORATION

According to the common law the place of incorporation determines whether the corporation exists and what its powers and functions are. Because of the similarity in function to the law of the domicile in relation to the status of a natural person, the place of incorporation is often referred to as the domicile of the corporation. The analogy is misleading here. For, whilst an individual can at any time change his or her domicile to another country on his or her own initiative, a corporation can only change its place of incorporation with the consent of both countries involved.

The Companies Act 1981 (Cth) now makes provision for the transfer of incorporation. Under s 83 a company may apply to the National Companies and Securities Commission to transfer its incorporation from one participating state or territory to another with the consent of the minister or authority in charge of corporate affairs in the state or territory of original registration. Under s 84 the company, once authorised to transfer under s 83, may apply to the Commission to be registered as a company under the relevant code of the other state or territory.

Under s 85 a foreign corporation may apply to be registered in a participating state or territory provided the transfer of the incorporation is authorised under the law of the original incorporation: s 85 (3)(a)(i). This requirement is in accordance with the common law: *Koninklijke Lederfabriek Oisterwijk v Chase National Bank of the City of New York* (1941) 30 NYS 2d 518; *Anderson v NV Transandine Handelsmij* (1941) 31 NYS 2d 194. If, however, the existing place of incorporation does not permit the change, it will

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not be recognised: *Banco de Bilbao v Sancha* [1938] 2 KB 176; *NV Suikerfabriek Wono-Aseh v Chase National Bank of the City of New York* (1953) 111 FSuppl 833.

POWERS AND FUNCTIONS OF CORPORATIONS

As stated earlier, the law of the place of incorporation determines the "capacity of a foreign corporation and the functions and powers of its organs or officers": per Lord Reid in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 919. Thus the law of incorporation determines who are the lawful directors of the company: *Banco de Bilbao v Sancha* [1938] 2 KB 176, and whether any particular body or person has the authority to act on behalf of the company: *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*. The law of the place of incorporation also determines the liability of the members of the company such as whether their liability is limited or unlimited: *Bateman v Service* (1881) 6 App Cas 386; *Risdon Iron and Locomotive Works v Furness* [1906] 1 KB 49.

A corporation which has the capacity under the law of the place of its incorporation to enter into contracts and do business generally will have its capacity recognised and given effect to in the forum: *Bateman v Service*; *Picturesque Atlas Publishing Co v Campbell* (1891) 24 SALR 145. It has been held in England that a foreign corporation which was authorised to hold land under the law of its incorporation could not do so in England in contravention of the now repealed Mortmain Acts: *A-G v Parsons* [1956] AC 421. *Semble*, this applies only in the case of a statute of the forum specifically restricting the capacity of foreign corporations to act within the forum. In the absence of such a prohibition a foreign corporation may exercise within the forum such powers and capacities as it possesses under its own law including the acquisition and ownership of land: *Re Transfer of Land Act* [1916] VLR 397; *Kavir Pty Ltd v Dwyer* [1973] Qd R 192.

Because of the express provisions of the Companies Act 1981, it would appear that a foreign company not registered in a participating state or territory as required under s 512 of the Act, will not have the power to hold land in such a jurisdiction: s 511, exercise the rights conferred upon corporations by legislation such as the Trade Practices Act 1974 (Cth) and, *semble*, will lack any standing to sue: *Nauru Local Government Council v Australian Shipping Officers' Association* (1978) 27 ALR 535 at 545 per Northrop J. However this would not affect the passive capacity of such a corporation to be held liable in respect of contractual or delictual obligations and to be sued.

DISSOLUTION AND AMALGAMATION OF COMPANIES

A corporation which has been dissolved under the law which created it can no longer sue or be sued in the forum or be recognised as being entitled, or subject to, any legal rights or obligations: *United Service Insurance Co v Lang* (1935) 35 SR (NSW) 487; *Re Usines de Melle's Patent* (1954) 91 CLR 42. However, it is provided in the Companies Act 1981 that a foreign corporation "may be

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wound up . . . notwithstanding that it is being wound up or has been dissolved or has otherwise ceased to exist as a body corporate under or by virtue of the laws of the place under which it was incorporated": s 470 (3); cf NZ: s 389.

The effect of this provision is to treat the foreign corporation as still being in existence for the purpose of winding up within the state or territory concerned with the result that the rights and liabilities of local creditors and debtors in relation to the dissolved corporation are to be treated as existing obligations which can be asserted by, or against, a corporation which remains a juristic entity for the purposes of winding up.¹

If a foreign corporation is merged into another corporation or amalgamated with another corporation into a new corporation under the law of the place of incorporation of the companies concerned, the new entity will be recognised in the forum: *National Bank of Greece and Athens SA v Metliss* [1958] AC 509. *Semble*, no amalgamation or merger can be recognised as such unless the new entity succeeds to substantially all the assets and liabilities of the merged or amalgamated corporations: *Adams v National Bank of Greece SA* [1961] AC 255. Where corporations incorporated in different countries are merged or amalgamated, *semble*, the law of the place of incorporation of each country must permit and recognise the merger or amalgamation with the other.

JURISDICTION

(i) *Partnerships*. At common law a foreign partnership could not be sued as such merely because some of the partners or a place of business of the partnership were within the jurisdiction. Each of the partners had to be brought within the jurisdiction either at common law or by virtue of the provisions of O 11 or its local equivalent: *Heinemann & Co v SB Hale & Co* [1891] 2 QB 83. In New Zealand this is still the case, the provisions of CCP RR 43 and 44 which regulate service of process upon partners having only domestic significance: *Smith v Spriggs* (1913) 33 NZLR 216.

In Australia partners carrying on business within the jurisdiction may sue or be sued in the name of their firm and proper service of the writ is effected by serving it either on one of the partners who is within the jurisdiction or upon the person who has the control or management of the partnership business within the jurisdiction. It does not matter that all members of the partnership are out of the jurisdiction and no prior leave to serve the writ is necessary. However, the resulting jurisdiction does not bind any partner who is out of the jurisdiction at the time the writ is issued.²

¹ *Russian and English Bank v Baring Bros & Co* [1936] AC 405 at 428, 429 per Lord Atkin. It may be presumed that an Australian court will not follow the decision to the contrary in *United Service Co Ltd v Lang* since this decision was based on the reasoning of the Court of Appeal in *Russian and English Bank v Baring Bros & Co* [1935] Ch 120, which was reversed by the House of Lords on appeal.

² ACT: O 50 rr 1, 3 and 8; NT: O 50 rr 1, 3 and 8; Qld: O 54 rr 1, 5 and 10; SA: O 48A rr 1, 3 and 7; Tas: O 54 rr 1, 3 and 8; Vic: O 48A rr 1, 3 and 8; WA: O 71 r 3 (1); H Ct: O 48 rr 1, 3 and 8; FCt: O 42 rr 2, 4 and 9. In New South Wales no specific provision is made regarding service on partners, but see Business Names Act 1962 (NSW) s 8 and RSC Pt 64.

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The rule is permissive and does not preclude service upon the individual partners either at common law or by virtue of some other statutory rule: *Hobbs v Australian Press Assoc* [1933] 1 KB 1. Even though service under the above-mentioned rule amounts to service on all partners, the English courts have allowed a plaintiff to join an absent partner individually as a co-defendant with the firm and seek leave to serve him out of the jurisdiction under O 11: *West of England Steamship Owners Protection & Indemnity Assoc Ltd v John Holman & Sons* [1957] 3 All ER 421.

(ii) *Corporations*. At common law a corporation could only be amenable to the jurisdiction of the court if it was "present" within the jurisdiction. In order to be "present" it must have (a) a fixed place within the jurisdiction for a definite period, and (b) carry on business there through an agent who has the authority on behalf of the company to enter into binding contracts with persons in the jurisdiction and who is not a mere ministerial agent: *Bowden Bros & Co v Imperial Marine Transport Insurance Co* (1902) 2 SR (NSW) 257. Thus a commercial traveller who canvasses orders within the jurisdiction and transmits them abroad for acceptance does not thereby render his employer company "present" within the jurisdiction: *Pearce v Tower Manufacturing and Novelty Co Ltd* (1898) 24 VLR 506. Nor is a foreign bank "present" within the jurisdiction because a local bank acts as an "advising bank" on a letter of credit transaction for it: *National Commercial Bank v Wimbourne* [1979] ACLD 478.

It is now provided by the Companies Act 1981 s 512(2) that a foreign corporation "carrying on business" within the state or territory concerned must lodge with the Commission the name and address of any person authorised to accept service within the jurisdiction and the address of the registered office within the state or territory. In New Zealand a company incorporated outside New Zealand which establishes a place of business within New Zealand must deliver to the registrar of companies the names and addresses of one or more persons resident in New Zealand authorised to accept service of process on behalf of the company: Companies Act 1955 (NZ) s 397 (1)(c).

Compliance with these provisions gives the local courts jurisdiction over the corporation either because it is the purpose of these provisions to place the foreign corporations on exactly the same footing as domestic corporations or because the filing of the documents with the registrar can be regarded as a submission to the jurisdiction of the local courts: per Lord Parmoor in *Employers Liability Assurance Corp Ltd v Sedgwick, Collins & Co Ltd* [1927] AC 95 at 115. As long as the information lodged remains on the file, service upon the person or at the address indicated therein is good even though the corporation has ceased doing business within the jurisdiction: *Sabatier v Trading Co* [1927] 1 Ch 495. In Australia if a foreign corporation fails to file the required information the common law rules must be applied: *Deverall v Grant Advertising Inc* [1955] 1 Ch 111. In New Zealand process may in such a case be served by leaving it at, or by sending it by post to, any place of business established by the company in New Zealand: Companies Act 1955 (NZ) s 404.